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No. 05-1076

# In the Supreme Court of the United States

KEVIN Y. PADOT, PETITIONER

*v.*

BRENDA G. PADOT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

When the parties divorced and their property was divided, petitioner agreed, and the trial court ordered, that respondent was entitled to 33.96% of petitioner's military retirement pay. Petitioner later waived a portion of his retirement pay in favor of veterans' disability benefits. The trial court ordered that respondent was entitled to 33.96% of what petitioner's retirement benefits would have been had there been no waiver. The questions presented are:

1. Whether the trial court's order violates the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408 (2000 & Supp. IV 2004), which was interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989), to authorize the division of retirement pay but not the portion of retirement pay waived in favor of disability benefits.

2. Whether the trial court's order violates the anti-attachment provision applicable to disability benefits, 38 U.S.C. 5301(a)(1) (Supp. III 2003).

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition should be denied.

### STATEMENT

1. a. Members of the military services who have served for the requisite period may retire from active duty and receive retirement pay. 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force). In addition, veterans who become partially or totally disabled as a result of military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits only to the extent that he or she waives a corresponding amount of re-

tirement pay. 38 U.S.C. 5305. Because disability benefits, unlike retirement pay, are exempt from taxation, 38 U.S.C. 5301(a), such waivers are common. See *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that state courts are preempted by federal law from treating a service member's retirement pay as community property divisible between the service member and former spouse upon divorce. Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. 1408 (2000 & Supp. IV 2004), which, in its current form, authorizes a state court to treat "disposable retired pay" either "as property solely of the [former service] member or as property of the [former service] member and his spouse in accordance with the law of the jurisdiction of such court," 10 U.S.C. 1408(c)(1). "Disposable retired pay" is defined in the statute as "the total monthly retired pay to which a member is entitled," less certain amounts. 10 U.S.C. 1408(a)(4). Among the amounts to be "deducted from the retired pay" are those waived "to receive compensation under * * * title 38"—*i.e.*, amounts waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, *supra*, this Court construed the USFSPA to reject the *McCarty* rule, but only in part. The Court held that, under the statute's "plain and precise language," state courts "have been granted the authority to treat disposable retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." 490 U.S. at 589 (emphasis added). Because the USFSPA excludes disability benefits from the definition of disposable retired pay, the Court concluded that state courts are preempted by federal law from treating as divisible property retirement pay waived in favor of disability benefits.

c. The veteran in *Mansell* argued that the state court's division of his total retired pay violated, not only the USFSPA, but also the anti-attachment provision applicable to veterans' disability benefits. Under that provision, 38 U.S.C. 5301(a)(1) (Supp. III 2003) (formerly 38 U.S.C. 3101(a) (1988)), disability benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." In light of its holding that the USFSPA precludes the division of retirement pay waived in favor of disability benefits, however, the Court found it unnecessary in *Mansell* to address whether the anti-attachment provision would independently afford such protection. See 490 U.S. at 587 n.6.[1]

2. Petitioner entered the military in April 1980 and married respondent in September 1980. The parties were divorced in 1995. At the time of the final divorce judgment, petitioner was still on active duty. Pet. App. 2a, 16a.

The parties agreed to a division of "military retirement * * * pay," Pet. App. 2a, with respondent entitled to 33.96% of the payments, *id.* at 2a, 17a. The order incorporating the agreement provided that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the * * * retired pay." *Ibid.*

Petitioner retired from active military duty in May 2000 and began receiving retirement pay in June 2000. He applied for disability benefits and was subsequently found to be 30% disabled. In December 2000, petitioner waived a portion of

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[1] In *Rose* v. *Rose*, 481 U.S. 619 (1987), the Court addressed the applicability of the anti-attachment provision to child support, holding that the provision "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Id.* at 634.

his retirement pay in favor of disability benefits. Approximately four months later, petitioner began working for the federal government as a civilian air-traffic controller. Pet. App. 2a-3a, 16a-17a.

In July 2002, respondent filed a "Motion to Enforce Final Judgment" in the Circuit Court for Pinellas County, Florida. She argued, among other things, that petitioner's waiver of a portion of his retirement pay in order to obtain disability benefits operated to reduce the amount she would receive under the final divorce judgment. Pet. App. 3a, 16a.

3. The Circuit Court ruled that, by reducing respondent's share of his retirement pay, petitioner violated the final divorce judgment. Pet. App. 16a-20a. The court reasoned that the "overall plan" of the judgment was that "the former wife's share of the military retirement would stand in the place of alimony," and that petitioner's waiver of retirement pay "altered" that plan and violated the judgment's prohibition on taking any action that altered or reduced respondent's interest in the retirement pay. *Id.* at 18a. The court found that result particularly "inequitable" because petitioner was receiving additional income from his job as an air-traffic controller. *Id.* at 18a-19a. In so holding, the court noted that, in *Abernethy* v. *Fishkin*, 699 So. 2d 235 (1997), the Florida Supreme Court had found that trial courts "are not powerless to enforce the original agreement so long as no funds from the disability pool are drawn upon to fulfill the obligations of the former husband to the former wife." Pet. App. 19a. The Circuit Court therefore ordered petitioner to pay respondent 33.96% of "the amount that the former spouse's military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments," but

specifically directed that no portion of petitioner's disability benefits be used to satisfy that obligation. *Id.* at 19a-20a.[2]

4. The Second District Court of Appeal of Florida affirmed in relevant part. Pet. App. 1a-14a.

Rejecting petitioner's contention that the "principles of federal preemption" in *Mansell* "prohibit[ed] the result ordered by the trial court," the appellate court found *Mansell* "materially distinguishable from * * * the present case." Pet. App. 4a-5a. The court explained that, unlike in *Mansell*, the parties in this case agreed that respondent was entitled to a percentage of petitioner's retirement pay and were ordered not to "take any action to reduce the other party's interest in the * * * retire[ment] pay." *Id.* at 5a. The court also explained that, unlike in *Mansell*, petitioner's remaining retirement pay and civilian income would enable him to comply with his obligations under the divorce judgment and that his disability benefits were shielded from respondent by the trial court. *Id.* at 5a-6a.

The District Court of Appeal also rejected petitioner's contention that the Florida Supreme Court's decision in *Abernethy* was distinguishable because the agreement in that case, but not in this one, explicitly required indemnification in the event that either party took an action that defeated the other party's right to receive a portion of the retirement pay. Pet. App. 7a-9a. The court explained that the order at issue here prohibited any action that would reduce the other party's interest in the retirement pay and that, although the order "does not specifically state that the Former Husband must

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[2] In a subsequent order, Pet. App. 21a-23a, the Circuit Court denied petitioner's motion for rehearing on a number of issues, including "the military pay question," *id.* at 22a, but modified its earlier decision to provide that petitioner's obligations to respondent be retroactive to the initial date of petitioner's employment as an air-traffic controller rather than the date of his retirement from active military service, *ibid.*

indemnify the Former Wife if he takes action that reduces her interest," the order "gives the [trial] court continuing jurisdiction 'to enforce the former spouse's rights to her share of the * * * benefits.'" *Id.* at 8a.

In concluding its opinion, the District Court of Appeal stated that "the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement * * * pay * * * when the trial court entered the * * * [o]rder" dividing property, and that, "when years later the Former Husband took the voluntary action of waiving [retirement] pay in order to receive disability benefits, the Former Wife's vested interest in his military retirement * * * pay was reduced." Pet. App. 9a. The court therefore "f[ou]nd no error" in the trial court's ruling that petitioner must "make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife." *Ibid.*[3]

5. The Supreme Court of Florida denied petitioner's petition for review. Pet. App. 15a.

## DISCUSSION

Petitioner contends (Pet. 10-25) that the Circuit Court's order, which required him to pay respondent an amount equal to the percentage of what his retirement pay would have been had he not waived a portion of that pay in favor of disability benefits after the final divorce judgment was entered, violates both the USFSPA as interpreted in *Mansell* and the anti-at-

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[3] In the same opinion, the District Court of Appeal reversed the trial court's decision insofar as it provided for payment by "income deduction order" (because Florida law limits the use of such an order to alimony or child support), Pet. App. 9a-10a; vacated a "clarification order" concerning retroactivity (because the order was not authorized by Florida's procedural rules), *id.* at 10a-12a; and reversed another order issued by the trial court insofar as it required petitioner to cooperate with respondent in obtaining and paying for a portion of a replacement survivor benefit plan, *id.* at 12a-13a. Those aspects of the appellate court's decision are not at issue here.

tachment provision applicable to disability benefits. Petitioner's USFSPA claim was correctly rejected by the District Court of Appeal, and its decision does not conflict with any decision of any state court of last resort. Petitioner's anti-attachment claim was not pressed or passed upon below, is in any event without merit, and has been uniformly rejected by state courts of last resort. The petition for a writ of certiorari should therefore be denied.[4]

**A. Certiorari Is Not Warranted On The Question Whether The Trial Court's Order Violates The USFSPA As Interpreted In *Mansell***

**1. The decision below does not conflict with the decision of any state court of last resort**

a. The District Court of Appeal approved the Circuit Court's order, and held that it did not conflict with *Mansell*, because petitioner had agreed, and the Circuit Court had directed, that he would pay respondent a percentage of his retirement pay and take no action to reduce respondent's interest in it. Pet. App. 4a-9a. The District Court of Appeal relied, in part, see *id.* at 6a-8a, on the Supreme Court of Florida's decision in *Abernethy* v. *Fishkin*, 699 So. 2d 235 (1997). That case held that, "while federal law prohibits the division of disability benefits," it "does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay" and includes an "indemnification provision[] ensuring such payments." *Id.* at 240.

The highest courts of at least six other States—Maine, Massachusetts, Nevada, Rhode Island, South Dakota, and

[4] This Court has previously denied certiorari in a case presenting the same USFSPA claim that is presented here, see *Seddio* v. *Michaels*, 529 U.S. 1068 (2000), and in a case presenting the same USFSPA and anti-attachment claims that are presented here, see *Shelton* v. *Shelton*, 541 U.S. 960 (2004).

Tennessee—have approved orders similar to the one entered by the Circuit Court on the basis of a contract-law theory similar to the one on which the District Court of Appeal relied.[5] And, as far as we are aware, no state court of last resort has rejected such a theory. There is therefore no conflict on that issue.

The highest courts of at least seven other States—Alaska, Arkansas, Nebraska, Mississippi, Montana, North Dakota, and Washington—have approved relief of the type at issue

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[5] See *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (*Mansell* "does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to [the agreed-upon percentage of] a veteran's retirement entitlement[s]" if the veteran subsequently waives a portion of the entitlements in favor of disability pay.); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the [marital dissolution agreement].") (footnote omitted); *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003) ("The judgment in this case does not divide the defendant's * * * disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * *, even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Black* v. *Black*, 842 A.2d 1280, 1285 (Me. 2004) ("the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay"); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but simply held [him] to the terms of the original [property settlement agreement] and ordered payment of an amount calculated in accordance with the agreed upon [property settlement agreement].").

here, and found it consistent with *Mansell*, on a different theory. Those courts have held that, in making an equitable distribution of property or an award of alimony, trial courts may consider the economic consequences of the veteran's waiver of retirement pay in favor of disability benefits and rely upon them as a basis for increasing the former spouse's share of the remaining property or the size of the alimony award.[6] The highest court of one state—Alabama—has rejected this theory. In *Ex parte Billeck*, 777 So. 2d 105 (2000), the Supreme

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[6] See *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991) (trial court may "t[ake] note of the disability benefits" in making an award of alimony); *Clauson* v. *Clauson*, 831 P.2d 1257, 1264 (Alaska 1992) ("federal law does not preclude our courts from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay"); *In re Marriage of Kraft*, 832 P.2d 871, 875 (Wash. 1992) ("when making property distributions or awarding spousal support in a dissolution proceeding, * * * the court may consider the [disability] pay as a basis for awarding the nonretiree spouse a proportionately larger share of the community property where equity so requires"); *Vitko* v. *Vitko*, 524 N.W.2d 102, 104 (N.D. 1994) (trial court may "consider[] the disability income 'so as to determine the financial circumstances of each party to the divorce'"); *Kramer* v. *Kramer*, 567 N.W.2d 100, 113 (Neb. 1997) (trial court "may consider [disability] benefits and the corresponding waiver of retirement pension benefits" in "determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits"); *In re Marriage of Strong*, 8 P.3d 763, 769 (Mont. 2000) ("a [trial] court may consider * * * disability benefits in the same way it considers each party's ability to earn income post-dissolution as an important factor in achieving an equitable property division"); *Steiner* v. *Steiner*, 788 So. 2d 771, 779 (Miss. 2001) ("Military disability benefits were properly considered by the chancellor in the award of alimony."). Unlike the contract-law theory, this theory is an available ground for decision not only when the waiver of retirement pay postdates the divorce decree and the trial court is ruling on a request for enforcement or modification, but also when the waiver *predates* the divorce decree and the court is making an initial property distribution or alimony award.

Court of Alabama held that, "[w]hen a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits," the trial court "essentially is awarding the wife a portion of those veteran's disability benefits[,] and in doing so * * * is violating federal law." *Id.* at 109.

There thus does appear to be a conflict on whether federal law permits a divorce court to consider a veteran's waiver of retirement benefits in making an equitable distribution of property or award of alimony. That question is not presented in this case, however, because the court below did not address it. Instead, consistent with the Florida Supreme Court's decision in *Abernethy*, the District Court of Appeal relied on a contract-law theory in affirming the order challenged by petitioner. Indeed, the Supreme Court of Alabama distinguished *Abernethy* on the ground that the agreement incorporated into the divorce judgment in *Billeck*, unlike the one in *Abernethy*, did not contain a provision that "protect[ed] the monthly sum the wife would receive should the husband's military retirement benefits be reduced." 777 So. 2d at 109. Insofar as it was suggesting that *Billeck* would have been decided differently if the agreement *had* contained such a provision, therefore, the Supreme Court of Alabama appears to agree with the rationale for the decision below (and with the uniform view of the state courts of last resort to consider the question)—namely, that a veteran can be contractually bound not to take action that reduces the former spouse's share of retirement benefits.[7]

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[7] At least three of the courts that allow consideration of a veteran's waiver of retirement benefits in distributing property or awarding alimony do so on the condition that the increase in the amount of property or alimony awarded to the former spouse not simply match dollar for dollar the amount of retirement pay waived by the veteran, but instead be based on an overall assessment of what is just and reasonable. See *Clauson*, 831 P.2d at 1264;

b. Petitioner contends that "at least six state supreme courts (Alabama, Alaska, Arkansas, Kansas, Montana, and Nebraska) * * * have taken diametrically the opposite position of that held below by Florida's courts." Pet. 18; accord Reply Br. 2. That is not correct.

As explained above, see pp. 9-10, *supra*, the theory rejected in the Alabama decision cited by petitioner, *Billeck*, *supra*, is one on which the decision below did not rely. And the Alabama decision arguably *endorses* the theory on which the decision below *did* rely.

The Alaska and Montana decisions cited by petitioner, *Clauson* v. *Clauson*, 831 P.2d 1257 (Alaska 1992), and *In re Marriage of Strong*, 8 P.3d 763 (Mont. 2000), did not address the contract-law theory on which the decision below relied. And, as noted above, see note 6, *supra*, they held that relief of the type at issue here *is* available—albeit on the theory that courts may consider the economic consequences of a veteran's waiver of retirement payments in making an equitable distribution of property. The Arkansas decision cited by petitioner, *Ashley* v. *Ashley*, 990 S.W.2d 507 (1999), likewise did not address the contract-law theory, and it likewise recognized that, when a veteran waives retirement payments in favor of disability benefits, the trial court may order "an increase in alimony." *Id.* at 509 (citing *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991)). Moreover, a subsequent decision of the Court of Appeals of Arkansas *did* adopt the contract-law theory, and, in doing so, explicitly stated that *Ashley* did not

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*Kraft*, 832 P.2d at 875-876, 877; *Strong*, 8 P.3d at 769. It is not clear whether that is the rule in other jurisdictions. Even if it is not, however, this case is not a suitable one for resolving any conflict that may exist on the issue, because the court below did not address the question whether a waiver of retirement benefits may be considered in making an equitable distribution of property, and thus necessarily did not address the subsidiary issue of dollar-for-dollar matches.

foreclose its adoption. *Surratt* v. *Surratt*, 148 S.W.3d 761, 766 (2004).

As for the Kansas and Nebraska decisions cited by petitioner, neither *In re Marriage of Wherrell*, 58 P.3d 734 (Kan. 2002), nor *Ryan* v. *Ryan*, 600 N.W.2d 739 (Neb. 1999), addressed whether relief of the type at issue here is available under either of the theories described above. *Wherrell* addressed the distinct question whether a particular payment to the veteran was "divisible retirement or indivisible military disability." 58 P.3d at 736. And *Ryan* held that "th[e] portion of the [divorce] decree purporting to divide [the veteran's] disability income" was "void for v ant of jurisdiction," because "federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over * * * disability benefits." 600 N.W.2d at 745. As noted above, moreover, see note 6, *supra*, a prior decision of the Supreme Court of Nebraska, *Kramer* v. *Kramer*, 567 N.W.2d 100 (1997), held that relief of the type at issue here *is* available, on the theory that courts may consider the consequences of a waiver of retirement payments in making an award of alimony. Any tension between the "jurisdictional" approach of *Ryan* and the decision in *Kramer* should be resolved by the Nebraska courts.

Petitioner also contends that the principle applied by the court below has been rejected by "the intermediate courts of appeals of an additional four jurisdictions (Louisiana, North Carolina, Texas, and Virginia)." Pet. 18. That contention would not support certiorari even if it were true, because this Court ordinarily grants certiorari in state cases only to resolve a conflict between "state court[s] of last resort" (or between a state court of last resort and a federal court of appeals). Sup. Ct. R. 10(b). In any event, there is no such conflict.

The Louisiana decision cited by petitioner, *Wright* v. *Wright*, 594 So. 2d 1139 (Ct. App. 1992), applied the principle that was applied in the decision below, but simply found that there was no breach of the agreement in that case. *Id.* at 1142. The same court applied the same principle in a subsequent decision and came to the opposite conclusion on the facts of that case. See *Poullard* v. *Poullard*, 780 So. 2d 498, 500 (La. Ct. App.) ("We agree with the trial court that 'the redesignation of pay cannot defeat the prior agreement of the parties.'"), writ denied, 790 So. 2d 641 (La. 2001). Similarly, the unpublished Virginia decision cited by petitioner, *Keough* v. *Keough*, No. 2140-96-4, 1997 WL 242559 (Ct. App. May 13, 1997), held that the veteran's former spouse was not entitled to a portion of his disability payments because the particular agreement in that case "unambiguously require[d] a reduction of the gross retirement pay by the disability payments received." *Id.* at *2. In published decisions issued both before and after *Keough*, the same court held, consistent with the decision below, that "parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments" to compensate for a waiver of retirement pay. *McLellan* v. *McLellan*, 533 S.E.2d 635, 638 (Va. Ct. App. 2000); *Owen* v. *Owen*, 419 S.E.2d 267, 269 (Va. Ct. App. 1992).

The North Carolina decision cited by petitioner, *Halstead* v. *Halstead*, 596 S.E.2d 353 (Ct. App. 2004), did not address the theory on which the decision below relied. And it explicitly endorsed the other theory on which relief of the type at issue here has been approved: that "federal law d[oes] not preclude the consideration of the economic consequences of a decision to waive military retirement pay in order to receive disability pay in determining the equitable distribution of marital assets." *Id.* at 356.

As for the Texas decisions cited by petitioner, neither *In re Marriage of Reinauer*, 946 S.W.2d 853 (App. 1997), nor *Loria* v. *Loria*, 189 S.W.3d 797 (App. 2006), addressed whether relief of the type at issue here is available under either theory.

**2. The decision below is correct**

*Mansell* held that the USFSPA prohibits state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 595. It does not follow from that holding, however, that the USFSPA prohibits state courts from interpreting settlement agreements that divide retirement pay to require the veteran to make the former spouse whole if the veteran takes an action that reduces the former spouse's proportion of the pay. Indeed, in at least two respects, the principle applied by the court below not only is consistent with *Mansell*, but finds affirmative support in it.

First, the Court recognized in *Mansell* that "domestic relations are preeminently matters of state law," that Congress "rarely intends to displace state authority in this area" when it passes general legislation, and that this Court therefore "will not find pre-emption absent evidence that it is 'positively required by direct enactment.'" 490 U.S. at 587 (quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), in turn quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). The Court concluded that *Mansell* "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *ibid.*, because, in "plain and precise language," the USFSPA provides that a state may treat "disposable retired * * * pay" as divisible property and "specifically defines" that term to exclude retirement pay waived in favor of disability benefits, *id.* at 588-589 (quoting 10 U.S.C. 1408(a)(4)(B) and (c)(1) (1988)). In

contrast, the USFSPA does not "directly and specifically" address the interpretation and enforcement of property-settlement agreements that guarantee the former spouse a fixed proportion of retirement pay. Indeed, the statute does not address that subject at all.

Second, the property-settlement agreement incorporated into the divorce decree in *Mansell* divided the total amount of the veteran's retirement pay, including the amount he had waived in favor of disability benefits, and the veteran requested modification of the decree to remove the provision requiring him to share the waived portion of his retirement pay. 490 U.S. at 585-586 & n.5. In this Court, the former wife argued that "the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened," but the Court held that "[w]hether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction." *Id.* at 586 n.5. On remand, the state appellate court ruled against the veteran on the ground that state law precluded the reopening of the settlement agreement, *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), and this Court denied certiorari, 498 U.S. 806 (1990). So, too, the question whether a particular settlement agreement obligates a veteran to make his or her former spouse whole in the event that the veteran subsequently waives retirement pay in favor of disability benefits is a matter of state contract law that—like the state law of judgments—is not preempted by the USFSPA. Indeed, insofar as the USFSPA's preemptive effect is concerned, there is little difference between a state-law rule prohibiting a veteran from challenging a divorce decree that divides disability benefits if he agreed to the division when the decree was entered (the rule at issue on remand in *Mansell*) and a state-law rule prohibiting a veteran from reducing a former spouse's share of

retirement benefits if he agreed not to take any action that would have that effect (the rule at issue here).

Petitioner places considerable emphasis (Pet. i, 7-10, 12-13, 15-16 & n.6, 21; Reply Br. 3) on the fact that there is no express indemnification provision in the settlement agreement. As the court below explained, however, the order incorporating the agreement prohibited petitioner from taking any action that would reduce respondent's interest in the retirement pay and gave the trial court continuing jurisdiction "to enforce [respondent's] rights to her share of the * * * benefits." Pet. App. 8a. Adjusting petitioner's payment obligations to make respondent whole for such a reduction in retirement pay would appear to be a legitimate enforcement mechanism. In any event, the question of what specific language is necessary to give a party an enforceable right under a contract or a court order incorporating a contract is one of state law, and any disagreement that may exist among state courts on that question is therefore not a basis for certiorari.[8]

### B. Certiorari Is Not Warranted On The Question Whether The Trial Court's Order Violates The Anti-Attachment Provision Applicable To Veterans' Benefits

Petitioner invokes this Court's jurisdiction (Pet. 1) under 28 U.S.C. 1257(a). Under that statute, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that ren-

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[8] This case does not present the quite different question whether a state court could enter an injunction or other order barring a veteran from waiving a portion of his retirement pay so as to receive tax-free disability benefits. This case, and the other cases discussed in this brief, concern only the consequences of such a waiver when the veteran has made a contractual commitment, embodied in a court decree, to provide the spouse with a certain level of alimony or division of property.

dered the decision [the Court has] been asked to review.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). Petitioner's contention that the Circuit Court's order violates the anti-attachment provision applicable to veterans' benefits, 38 U.S.C. 5301(a)(1) (Supp. III 2003), was not addressed by the District Court of Appeal. See Pet. App. 3a-10a. When a state court "is silent on a federal question," this Court "assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption." *Adams*, 520 U.S. at 86-87 (citation omitted). Petitioner makes no attempt to discharge that burden, and it appears that any such attempt would be unsuccessful.[9] That is a sufficient basis for denying certiorari on the second question in the petition.[10]

In any event, the anti-attachment provision affords petitioner no basis for relief. Under that provision, it is only "[p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs]" (which

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[9] An anti-attachment claim was not raised either in petitioner's initial brief or in his reply brief in the District Court of Appeal. See Pet. Dist. C.A. Br. 13-26; Pet. Dist. C.A. Reply Br. 3-7. And although petitioner's motion for rehearing in that court quoted a subparagraph of 38 U.S.C. 5301, see Pet. Mot. For Reh'g 7 (quoting Section 5301(a)(3)(A)), it did not quote the anti-attachment provision (Section 5301(a)(1)). Moreover, this Court has "generally refused to consider issues raised * * * for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89 n.3.

[10] Since the court below did not cite or mention—much less discuss—the anti-attachment provision, it is hard to know what petitioner means when he says that the court was "clearly cognizant" of it. Pet. 24. In any event, it is not enough that a lower court be "cognizant" of the statutory provision on which the petitioner is relying in this Court; the actual legal claim that is based on the provision must have been pressed by the petitioner or passed upon by the lower court.

include disability benefits) that are non-assignable, exempt from the claim of creditors, and not liable to attachment, levy, or seizure. 38 U.S.C. 5301(a)(1) (Supp. III 2003). Whatever applicability that provision might have in a case in which the veteran is ordered to pay the former spouse a portion of his disability benefits, this is not such a case. Petitioner is receiving civilian income and retirement pay in addition to disability benefits, and the trial court's order explicitly provides that nothing in its order "should be read to require the former husband to pay any portion of his disability * * * income * * * over to the former wife" and that "no portion of that pool of funds in whatever amount that pool may be from time to time [may] be payable over to the former wife." Pet. App. 19a. Far from having violated the anti-attachment provision, the trial court took pains to comply with it.

Nor is there any conflict among state courts of last resort on the second question in the petition. Some of the decisions that reject the contention that relief of the type at issue here violates the USFSPA as interpreted in *Mansell* also reject the contention that such relief violates the anti-attachment provision applicable to veterans' benefits. See *Krapf*, 786 N.E.2d at 326 n.12 (contract-law theory); *Clauson*, 831 P.2d at 1263 & n.9 (theory that disability payments may be considered in dividing property); *Strong*, 8 P.3d at 769-771 (same). But petitioner cites no decision of any state court of last resort that has reached a contrary conclusion, and we are not aware of any.[11]

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[11] Under Section 641 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1511 (codified primarily at 10 U.S.C. 1414 (Supp. IV 2004)), which is being phased in over ten years, a service member who did not retire based on a determination of medical unfitness and is at least 50% disabled will be entitled to receive both retirement pay and disability benefits without waiving any portion of the retirement pay. We are informed by the Department of Defense that those who benefit from that law

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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constitute approximately one fourth of the total number of service members who are eligible for both retirement pay and disability benefits. Accordingly, while the law is likely to cause a decrease in the number of cases in which the retirement pay divided upon divorce is later reduced as a result of the veteran's receipt of disability benefits, and thus in the number of cases in which the questions presented here may arise, such cases will not be eliminated entirely.